Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 23911
FIRST DIVISION Docket No. 43541
89-1-88-1-U-1633

The First Division consisted of the regular members and in addition Referee David P. Twomey when award was rendered.

PARTIES TO DISPUTE: (Andrew Woolfolk
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of conductor/brakeman Andrew Woolfolk, Illinois Division, to be reinstated with full back pay from the date of his removal from service, with full seniority and vacation rights unimpaired, and with all notation of this discipline removed from his record."

FINDINGS:

The First Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

By notice dated August 10, 1987, the Petitioner was notified of the results of a formal investigation as follows:

"TO: ANDREW WOOLFOLK_ _ _ _ _

OCCUPATION: BRAKEMAN _ _ _ _ _ _ _ _

LOCATION: DUPO, ILLINOIS C/C TERMINAL SUPT. J. A. CALLOWAY

DEAR SIR:

YOU ARE HEREBY ADVISED THAT YOUR RECORD HAS THIS DATE BEEN ASSESSED WITH DISMISSAL FOR YOUR VIOLATION OF GENERAL RULE 'G' OF THE GENERAL CODE OF OPERATING RULES WHEN YOUR REASONABLE CAUSE TOXICOLOGICAL TESTING THAT YOU WERE ADMINISTERED ON FEBRUARY 2, 1987 SUBSEQUENTLY TESTED POSITIVE AS DETERMINED IN FORMAL INVESTIGATION CONDUCTED DUPO, ILLINOIS AUGUST 4, 1987._ _

YOUR RECORD NOW STANDS: DISMISSED.

/s/ G. O. Everett
G. O. EVERETT - SUPERINTENDENT"

The Carrier contends that it complied with FRA regulations in requiring Petitioner to undergo drug testing under Subpart D, 49 C.F.R., Part 219 (1986), and refers to 49 C.F.R. at 219.301 (C)(2)(i) and (ii). That regulation states in part:

> "(2) Reasonable suspicion. Reasonable cause also exists where a supervisory employee of the railroad has a reasonable suspicion that the employee is currently under the influence of or impaired by alcohol or a controlled susbstance (sic), based upon specific, personal observations that the supervisory employee can articulate concerning the appearance, behavior, speech, or body odors of the employee, subject to the following limitations:
>
> (i) An employee may be required to submit to urine testing for reasonable suspicion only if the determination is made by at least two supervisory employees; and
>
> (ii) If the determination to require urine testing is based upon suspicion that the employee is under the influence of or impaired by a controlled substance, at least one supervisory employee responsible for the decision to require urine testing must have received at least three (3) hours of training in the signs of drug intoxication consistent with a program of instruction on file with FRA under Part 217 of this title. Such program shall, at a minimum, provide information concerning the acute behavioral and apparent physiological effects of the major drug groups on the controlled substances list (narcotics, depressants, stimulants, hallucinogens, and marijuana)."

The Carrier states its case relating to the above as follows:

"The Carrier's merits arguments establish Trainmaster Calloway and Road Foreman Lowery witnessed the Claimant act and talk in an incoherent manner; at the hearing they articulated their sensory perception observations of the Claimant's impaired conduct; and Road Foreman Lowery completed the Carrier's eight hour drug intoxication identification course. Thus the Carrier fully complied with the FRA's reasonable suspicion regulations. Mr. Woolfolk's procedural allegation the Carrier improperly required him to provide a urine specimen is without merit."

Terminal Superintendent Calloway testified in part as follows:

"... Mr. Woolfolk was tested based upon a reasonable suspicion, after my talking to him about the incident and through my observation I felt that Mr. Woolfolk at that time was nervous, somewhat disoriented and very much incoherent because of the incident. Through my observation I didn't want to just base it on my observation alone, I summoned Mr. B. Lowery, who will testify later, to also question Mr. Woolfolk same time that I did and to get his observation, and from the observation from the two of us we then in turn talked to the Division Office as to our observation and we agreed that we would have Mr. Woolfolk tested for reasonable suspicion...."
(emphasis added)

"Q. Mr. Calloway, you testified that Andy, Mr. Woolfolk, was incoherent, is that correct?
A. That is correct.

Q. You had trouble understanding his talking?
A. Yeah, he was very nervous and his words were very unsteady, it appears that he was completely shook up from the incident.

Q. That's understandable shoved into wrong track, are you assuming he was under the influence then?
A. My observation as I said before I didn't just want to base my observation that's the reason I had Mr. Lowery to come in so we both can observe to make sure that it wasn't just the one observation but the two of us."
(emphasis added)

"Q. Mr. Calloway, you testified earlier that Mr. Woolfolk in your opinion was under the influence or something was wrong with him, is that correct?

A. Well yeah, I testified not that he was under the influence I testified that his action, his voice, was incoherent, the nervousness, but not that he was under the influence.

Q. Is this what prompted you to call Mr. Lowery that you thought that he should be tested?

A. What prompted me to call Mr. Lowery was my observation and I wanted to get a second observation from him to see if we both agreed that Mr. Woolfolk needed to be tested.

Q. There had to be a reason, did you think he was under the influence?

A. No, I did not at the time think he was under the influence, but after we talked to Mr. Woolfolk is when we both agreed through observation that he needed to be tested and actually for what had happened, the misalignment of the switch which involved the incident shoving into another cut, which prompted our more or less to have Mr. Woolfolk tested...."
(emphasis added)

Mr. Calloway had no special training in signs of drug intoxication. (Nor did he have to.) He stated that he did not think Petitioner was under the influence; and stated as underlined above that Petitioner was tested "more or less" because of "the misalignment of the switch which involved the incident shoving into another cut." No evidence of record before this Board indicates that Petitioner was responsible for an operating rule violation or error in regard to the alignment of a switch. No basis exists then for testing because of a misaligned switch, which was Mr. Calloway's real basis for seeking the urine testing. We find that Mr. Calloway did not have a reasonable suspicion that Petitioner was currently under the influence of or impaired by a controlled substance. Moreover, as stated in the testimony of Mr. Calloway set forth above, Mr. Calloway testified that Petitioner's nervousness and incoherence was "because of the incident." He did not testify that he has reasonable suspicion that Petitioner's nervousness or incoherence was because he was currently under the influence or impaired by drugs.

Road Foreman of Engines B. L. Lowery testified in part:

"Q. Mr. Lowery you have heard the caption of this investigation referring to the reasonable cause to toxicological testing of Mr. A. Woolfolk on February 2nd, 1987. Mr. Lowery, why was Mr. Woolfolk tested?

A. He was tested under reasonable suspicion on the morning of February 2nd. I got a call in my office at St. Louis that we had a Union Pacific train doubling over in A&S Yard that had collided with A&S Yard engine and cut of cars. I got over to the A&S approximately 6:45 AM, met with Mr. Calloway and Mr. Woolfolk, went over the moves that was made. Under my observation Mr. Woolfolk was nervous, disoriented and Mr. Calloway and I talked and decided on the reasonable suspicion testing and called the Division Office and told them what the results of the questioning with Mr. Woolfolk and what we had decided upon. They agreed that to have him tested. I transported him to the Deaconess Hospital for the testing...."

"Q. Did you honestly feel that Mr. Woolfolk was impaired under the influence supposedly?

A. Not necessarily under the influence, No.

Q. Did he act funny to you?

A. Yes, he was very nervous and more concerned about where his grip was than protecting the move that he made into the wrong track at the A&S...."

As set forth in the FRA regulations 219.301 (C)(2)(ii), at least one supervisory employee responsible for the decision to require urine testing must have received at least three hours of training on the signs of drug intoxication consistent with a program of instruction on file with the FRA under Part 217. Such program shall at a minimum provide information concerning the acute behavioral and physiological effects of the major drug groups on the controlled substance list. Mr. Lowery was identified in the Carrier's Submission as having completed the Carrier's eight hour drug intoxication identification course. However, the transcript of the investigation does not bear out such an assertion for the benefit of this Board. Mr. Lowery testified on his qualifications only as follows:

"Q. Mr. Lowery, are you familiar with procedures used by Union Pacific Railroad for drug and alcohol testing?

A. Yes I am.

Q. How have you become familiar with these procedures?
A. I have attended seminars that was put on by the Law Departments Special Services and Labor Relations...."

"Q. You say you have gone to training sessions with Labor Relations. Have you gone to any for medical reasons, such as urine test procedures?
A. This was covered in the seminars that I attended prior to the Federal rules going into effect."

The record before this Board does not show, as required by the FRA regulation set forth previously, that Mr. Lowery had the required three hours of training on the signs of drug intoxication consistent with a program of instruction on file with the FRA. The burden of proof is on the Carrier in this regard, and conformity of Mr. Lowery's training to the FRA regulation should have been developed in the record.

As just stated, the Carrier has the burden of proof to establish that Mr. Lowery had a reasonable suspicion that Petitioner was currently under the influence of or impaired by a controlled substance based on specific personal observations. Mr. Lowery testified that Petitioner was "very nervous and was more concerned about where his grip was then protecting the move he made into the wrong track on the A&S." Mr. Lowery questioned Petitioner after 6:45 A.M. The incident happened at 6:00 A.M. The questioning took place after the crew had completed yarding the train, when no further responsibility to protect the train existed. Such a statement as quoted above without further development does not aid this Board in understanding a basis for reasonable suspicion that an employee is currently under the influence of or impaired by a controlled substance.

Trainmaster M. A. Soholt observed Petitioner for the Carrier during the many hours they were at the hospital. He did not participate in the decision making process to require the urine testing as set forth in the following testimony:

"Q. Mr. Soholt, did you talk to Mr. Woolfolk at the Alton and Southern?
A. If I did it was passing conversation.

Q. Then you would have no knowledge of his being under the influence?
A. No

Q. Did he appear under the influence to you?
A. I didn't notice one way or the other.

Q. What was the reason that they decided to go ahead with the test?
A. I wouldn't have any idea.

Q. No probable cause?
A. I don't know.

Q. You have no knowledge of this?
A. I wasn't participating in that part of the decision making process, I was basically transporting and accompanying an Officer for the process."

The FRA regulation applicable to this case states that an "employee may be required to submit to urine testing for reasonable suspicion only if the determination is made by at least two supervisory employees." As set forth above the record does not support a conclusion that Mr. Calloway had had a reasonable suspicion that Petitioner was currently under the influence or impaired by a controlled substance at the time the decision to test was made. Trainmaster Soholt attempted no such determination. Thus, even if Mr. Lowery's testing could somehow be construed to state a reasonable suspicion that Petitioner was currently under the influence or impaired by a controlled substance at the time it was decided that Petitioner should be tested (and, remember that Mr. Calloway testified that he and Mr. Lowery both agreed that Petitioner had to be tested more or less for what had happened, the misalignment of the switch), then the determination that a reasonable suspicion of current drug impairment was not made by at least two supervisory employees as required by the above set forth FRA regulation in order to require an employee to submit to urine testing for reasonable suspicion. We shall sustain this claim to the extent set forth at the end of our Findings.

The Carrier and the Organization are advised that the instant case contains many problems which should be addressed to avoid future disputes. Prior to the investigation the Organization requested that:

"...

Second, the laboratory technicians that performed the tests on Mr. Woolfolk's urine, as well as all persons involved with the internal and external chain of custody, should be called. A piece of paper does not satisfy the carrier's duty of confrontation and cross-examination."
(Mr. Ables July 30, 1987 letter)

The Carrier did not call any qualified medical expert to testify at the investigation. The Local Chairman in his preinvestigation letter of June 8, 1987 to the Carrier indicated the type of information he wanted from the Carrier or its designated laboratory, including for example licensing of the laboratory and its technicians, proficiency testing and written reports of technicians (see pages 2 and 3 of that letter). When no qualified medical expert was called to testify, the Organization objected and appealed the decision in part on that point. The eleven page document from the Carrier's designated testing laboratory's director of toxology dated January 14, 1988 was a belated attempt by the Carrier to address matters that should have been handled at the August 2, 1987 investigation enabling the Carrier to fulfill its obligation to provide a fair investigation under its Agreement (please see the notice of the investigation which focused on the results of the laboratory's testing); enabling the Organization a fair opportunity to fully question in this critical area; and, most importantly, enabling the trier of fact to have the benefit of such a full presentation in making its important decision. We point out that the information in the January 18, 1988 eleven page report comes five months too late to benefit the parties. We take no position as to the many issues interwoven in the voluminous record developed by the parties to this case, other than the decision to test Petitioner was not in conformity with the FRA regulations as set forth previously.

The Petitioner died prior to the hearing of this case before the Board. We shall sustain the claim to the extent that his estate shall be made whole for all time lost as a result of his wrongful dismissal by the Carrier. The Carrier may offset the amount paid to Petitioner as a result of First Division Award 23865.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 13th day of January 1989.

CARRIER MEMBERS' DISSENT
TO
AWARD 23911, DOCKET 43541
(Referee Twomey)

The Majority concluded that a resolution of the dispute before the Board required a determination of whether the Carrier had complied with the provisions of the FRA regulations. Thus, the Award begins with a recitation of various provisions of the regulations relating to the subject of what constitutes reasonable suspicion that an employee is under the influence or impaired by a controlled substance and the conditions under which an employee may be required to submit to drug test. The remainder of the Award proceeds to analyze the facts of the dispute, as the Majority viewed the facts, measuring the facts against what the Majority believed was the intent and requirement of the regulations.

The purpose of this Dissent is not to take issue with the factual findings of the Majority although we believe that such findings are inaccurate and contrary to the evidence presented at the Investigation. What we do take issue with here, and what we believe has rendered this Award void and unenforceable, is the Majority's finding that it had jurisdiction to determine whether the Carrier complied with the FRA regulations. We believe it clear that once the Board determined that the issue before it required an interpretation of the FRA regulations and the Carrier's compliance with them, the Board should have dismissed the claim on the grounds that it did not have jurisdiction to determine the matter.

This Board has consistently and repeatedly held that its jurisdiction extends no further than the interpretation of collective bargaining agreements. It does not extend to the interpretation or application of statutes or regulations. Indeed, the same Referee sitting with the Board in this case recently dismissed a claim with the comment (First Division Award 23909):

> "It is well settled that the jurisdiction of the Board is restricted by statute to disputes involving 'the interpretation or application of labor agreements.'"

The same Referee had the following to say in Third Division Award 20368:

> "It is unquestionably settled that this Board is not empowered to interpret the laws of Congress. This Board has no discretion in this matter nor may we advise parties as to optional courses to pursue."

There are numerous Awards of all Divisions of the Board recognizing that the jurisdiction of the Board is limited to the interpretation of collective bargaining agreements. See, for example, First Division Awards 23107; Second Division Awards 6462, 2531; Third Division Awards 22093, 19790, 19619, 17627, 15143, 14745, 2167.

Furthermore, the FRA regulations specifically provides that the Department of Transportation has the authority and responsibility to investigate and make determinations concerning compliance with the FRA regulations. 49 C.F.R. Section 219.9 (a)(3)(5). There is no indication in the regulations that this Board was requested or authorized to trespass in this area.

In conclusion, the decision of the Majority is that the Carrier's actions in this case were not consonant with its

obligations under the FRA regulations. The Majority, however, has pointed to no Congressional mandate authorizing the Board to make such determinations or is there anything in the FRA regulations ceding the Board jurisdiction. To the contrary, another federal agency has been authorized to determine a Carrier's compliance with the very provisions of the FRA regulations involved in this dispute. The Board clearly exceeded its jurisdiction and its Award is void and unenforceable.

M. W. FINGERHUT

R. L. HICKS

Labor Members' Response

To The

Carrier Members' Dissent

To

Award No. 23911

The Carrier Members' Dissent is egregiously in error from beginning to end and compels this response.

The Dissentors mistakenly believe that the Board lacked jurisdiction to determine whether the Carrier complied with FRA regulations relative to reasonable cause testing for drug or alcohol impairment.

They cite 49 C.F.R. Section 219.9(a)(3)(5) claiming "the FRA regulations specifically provides (sic) that the Department of Transportation has the authority and responsibility to investigate and make determinations concerning compliance with the FRA regulations."

49 C.F.R. Section 219.9(a)(3)(5) states as follows:

"219.9 Responsibility for compliance.

(a) A railroad that --
(3) Willfully and with actual knowledge, requires an employee to submit to testing in reliance on section 219.301 without observance of the conditions and safeguards contained in Subpart D of this part;
(5) Fails to comply with any other requirement of this part; shall be deemed to have violated this part and shall be subject to a civil penalty as provided in Appendix A."

Appendix A reads in pertinent part:

"Section		Violation	Intentional Violation 2/
*******		*********	**********
	Subpart D -- Authorization to Test for Cause		
219.301	Required employee to submit to testing without reasonable cause or without observance or procedures and safeguards		2,000
219.309	Failure to provide effective notice of presumption from positive urine test	500	2,000"

It is quickly apparent that the material cited by the Dissentors goes to the determination of regulation compliance for the purpose of imposing a civil penalty against the carrier should it fail to observe the conditions or safeguards of Subpart D -- Authorization to Test for Cause. However, whether to impose a civil penalty was not the matter before this Board, nor did this Board rule on that question.

The actual issue before this Board was the reinstatement and back pay claim of Mr. Woolfolk, and the FRA's Final Rule most certainly vested this Board with the authority to take judicial notice of the subject regulations in order to ascertain the validity of that claim. In this regard we refer the Minority to Appendix 4, Part 219, Subpart D (General Questions), supra. Q&A No. 22 appears as follows:

> "Q: If the employee is removed from service at the time a urine test is conducted and is not returned to service until after the test result comes back, is the employee entitled to back pay?
>
> A. The employee will not necessarily be out of service during this interval. The railroad will determine whether to remove the employee from service based on the same factors that governed prior to the effective date of the rule. For instance, did the employee

> violate other rules? Is there sufficient information to make a Rule G charge or to order a medical or EAP evaluation? The testing process itself will not cause employees to lose compensated time. In any event, all disputes related to pay or benefits will remain subject to section 3 of the Railway Labor Act." (Emphasis added)

This language makes it abundantly clear that FRA intended this dispute to be handled in accordance with Section 3 of the Railway Labor Act (RLA). Such handling demands that a Section 3 tribunal must necessarily consider FRA regulations arguments as was done in this case.

Not only has FRA fashioned 49 CFR Part 219 regulations so as to be compatible with Section 3 of the RLA by repeated references (twice in Appendix 4 alone), it has also inextricably intertwined the regulations with collective bargaining agreement discipline/hearing rules. In its amendments to the Final Rule, FRA provides at Part 219.605:

> " (d) Hearing procedures. Nothing in this part shall be deemed to abridge any additional procedural right or remedies not inconsistent with this part that are available to the employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law with respect to the removal or other adverse action taken as a consequence of the positive test result."

Additionally, we would point out to the Minority that this case falls no less appropriately within this Board's jurisdiction than any other case requiring notice of regulation or statute where such regulation or statute is interwoven into the fabric of the collective bargaining agreement. Recent examples of such cases include disputes requiring observation of the Hours of Service Law (Award No. 22925), Federal Employers' Liability Act (Awards Nos. 23812 and 23840), Title VII of the Civil Rights Act (Award No. 23821), to name a few.

In consonance with the blending by FRA of agreement rules, RLA provisions and these FRA regulations, the parties properly presumed the Board's jurisdiction.

We refer the Minority that portion of the Carrier's submission quoted in part at the top of Page 3 of this Award wherein the carrier itself raised and relied upon the FRA reasonable suspicion regulations as its defense to the claimants' procedural allegation that the carrier improperly required him to provide a urine specimen. Now that the Findings clearly demonstrate that the carrier had not complied with the FRA reasonable suspicion regulations, and thus that its defense was invalid, we hear from the Minority that the award is void and unenforceable because the Board has no authority to determine whether the carrier complied with these FRA regulations. Beyond any doubt, the record shows that the carrier raised, relied upon and accepted the applicability of the FRA reasonable suspicion regulations to this case. It is absurd for the Minority to now assert, after the conclusion of all the proceedings, a position totally opposite to that taken by the carrier during the progression of this dispute on the property and in its submission to this Board.

In conclusion, 49 CFR Part 219 is inextricably integrated into the parties' agreement, and disputes pertaining to claims for back pay and benefits are specifically directed by Part 219 to be handled in accordance with Section 3 of the RLA; thus the cogent Findings were drawn from the essence of the collective bargaining agreement. The parties to this dispute joined the FRA regulation compliance issue and indicated no reluctance to the Board's invocation of jurisdiction in this dispute. The Dissentors' untimely suggestion that this Board lacked jurisdiction is preposterous and for the reasons stated herein must be rejected.

R K Radke

J. R. DeBolt

L. W. Swent